Citation: *R.* v. *Samson*, 2013 YKTC 36

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11-00492
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Cozens

REGINA

v.

STEVEN JOSEPH SAMSON

Appearances:
Terri Nguyen — Counsel for the Crown
Michael Reynolds — Counsel for the Defence

REASONS FOR SENTENCING

[1] COZENS C.J.T.C (Oral): Steven Samson has entered guilty pleas to having committed three offences contrary to s. 259(1) of the *Criminal Code* for operating a motor vehicle while disqualified from doing so, and one charge under s. 145(5) of the *Criminal Code*, for failing to attend court, which included the aggravating factor that it happened on a second occasion. The second occasion was in a breach of a recognizance, and the first was in a breach of a Promise to Appear.

[2] The circumstances of the offences are that on June 4, 2010, RCMP in

Whitehorse pulled over a vehicle that went through a red light. The vehicle did not pull over right away; however, once the officer pulled beside the vehicle with the lights and siren on, it pulled over. Mr. Samson was operating the vehicle. The RCMP were able to determine that at the time that he was operating this vehicle he was subject to a driving prohibition of three years, which was imposed pursuant to a conviction for two impaired driving offences on February 17, 2010. Mr. Samson was released on a Promise to Appear.

[3] On August 11, 2010 at 5:45 p.m., RCMP in Whitehorse were called by an individual who said a vehicle was following him. They pulled this vehicle over; Mr. Samson was driving it and, again, he was subject to the same driving disqualification. Mr. Samson was released on a Promise to Appear. Unlike June 4th, he was cooperative and did not attempt to mislead the RCMP with respect to who he was, which he had in fact done on the June 4th incident. Mr. Samson then failed to attend in court on September 22, 2010, as he was required to do by his Promise to Appear.

[4] Subsequently, on October 15, 2011, Mr. Samson was operating a vehicle in the Whitehorse area and this vehicle was involved in a roll-over accident. He was the only one in the vehicle. Mr. Samson admitted to driving and stated that he had had a problem with his tire blowing out. He was, again, operating the vehicle while he was disqualified from doing so.

[5] Mr. Samson failed to attend court on December 14th, 2011. He was subsequently arrested on a warrant at his residence in British Columbia and brought back to court to deal with these matters. In total, Mr. Samson has been in custody 151

days with respect to these charges.

[6] Mr. Samson's criminal history includes an impaired for which he received a fine in 2000; some unrelated charges; another impaired in 2002 for which he received 14 days custody; and two further impaireds that I have made reference to in 2010, for which he received 90 days on each, and the three-year driving prohibition. There are several fail to comply with probation orders, and an unlawfully at large on his record as well.

[7] Crown is suggesting a period of custody of 15 to 18 months and a three year driving prohibition. Defence counsel is suggesting that the custody for all of these offences be in the nine month range.

[8] Mr. Samson is 33 years of age and a resident of British Columbia. He has a fiancé and a six-month-old child. I have some positive letters of support from his fiancé, from a fellow-employee, and from his union representative that indicates that they should be able to find work for him when he is released from custody.

[9] Mr. Samson has no prior driving while disqualified convictions, so this is not akin to the case where an individual has been convicted, goes out and does it again and is convicted, and goes out and does it again. These are, really, first offences, but clearly aggravating in the sense that, while he is already facing a charge, he goes out and does the same thing for which he has already been charged, and then goes out and does it again.

[10] I have reviewed case law in the Yukon with respect to driving while disqualified

cases, and certainly, the foundational case for driving while disqualified convictions in the Yukon is ***R***. v. ***Battaja***, [1990] Y.J. No. 208. This is a decision of his Honour Judge Lilles, and still remains good law, in which an individual convicted of driving while disqualified can certainly expect there to be a period of custody. Generally speaking, while there are variations above and below it, for a first offender with no other aggravating circumstances, given that, usually, there is an underlying impaired conviction, you are looking at a 30 day sentence. It can go up or down, depending on the mitigating factors.

[11] With respect to the significance of driving while prohibited and what courts are to consider, I have looked at the ***R***. v. ***Taylor*** case, 2008 YKCA 1. In this case, it was an appeal of a sentence of eight months in jail for driving while disqualified. Mr. Taylor had a prior driving while disqualified a number of years earlier. The predicate offence in that case was noted in para. 4. It says:

> This is Mr. Taylor's second conviction for driving while disqualified. The first was recorded on 17 January 1997 in Whitehorse when he was also convicted of causing death while his ability to drive was impaired by alcohol. On that occasion, he was sentenced to four years for the latter offence with a ten-year driving prohibition, and one year concurrent on the former offence. His record includes four drinking and driving convictions prior to 1997.

He was in the final year of his ten-year prohibition when, on two separate occasions, June 25 and again on June 26, he was driving his wife so that she could get to work. There was no allegation of bad driving, but also the Court noted no indication that he had "…stopped drinking for a significant period of time that would lessen that concern in the Court's mind." The Judge in that case emphasized the seriousness of the predicate

offence, that being the impaired death. The Court said that:

> I do not think the judge overemphasized this factor. The public safety concern to which the judge referred is real and pressing. Generally speaking, driving prohibitions must be obeyed and breaches sanctioned in a meaningful way. Specific deterrence for this man is required because of his bad criminal history and somewhat casual attitude towards the driving restriction.

[12] The aggravating factors that the trial Judge spoke of and that the Court reviewed, were, first, "…the order that was breached related to a very serious predicate offence, impaired driving causing death." The aggravating factor was that he happened to be caught driving twice within 24 hours on two separate days, which could have given rise to two separate convictions, as there are clearly two separate instances of driving.

[13] Mr. Taylor, in that case, was considered not to take the driving prohibition order seriously, and certainly, that is a factor here, as there are three separate incidents, not back-to-back days, but three separate instances. That said, we do not have the underlying predicate offence of an impaired death for which the driving prohibition of Mr. Taylor was imposed. We have two impaireds for which the 90 day sentences were given.

[14] A number of other cases were considered in the ***Taylor*** case. I also looked at ***R***. v. ***Johnnie***, 2009 YKSC 42, a decision of Mr. Justice Gower. That was a case of an individual with 69 convictions; 10 for drinking and driving, one for failing to provide an alcohol analysis, and 13 prior convictions for driving while disqualified. The Crown was seeking a global sentence of four years; two years for the driving charge, one year concurrent for the breach of probation, as Mr. Johnnie had 13 prior breaches of

probation, and one year consecutive for the driving while disqualified. There was also a failing to stop offence, for which one year consecutive was sought. It was four years in total. Failing to stop for a police officer was also considered to be a very serious offence. The Court reviewed the ***Taylor*** decision and the comments with respect to driving while disqualified, and imposed a jail sentence of, on the impaired, the two years less one day that was being sought, and a driving prohibition of five years; on the driving disqualified, a sentence of eight months consecutive - that is with 13 prior convictions; eight months consecutive on the failing to stop for an officer, and eight months concurrent on the breach of probation. I recognize that there is a global consideration in that case.

[15] We are dealing with guilty pleas in this case. We have an individual with four prior impaireds, and it is aggravating that he is obviously familiar with driving disqualifications and he chose not to comply, and he chose to do it on three separate occasions. That said, it is not, as I indicated earlier, the same as sentencing him, having him go out and do it again, sentencing him, having him go out and do it it again, and sentencing him again; a case in which the jump principle more strictly applies; a principle that always has to be applied carefully and not with too much automatic treatment.

[16] Based on the case law that I have read, the circumstances of this case, and the aggravating and mitigating factors, I find that the appropriate sentence does not approach that that is sought by the Crown. The lack of priors is a significant issue here, and the fact that we are not dealing with a predicate offence such as we were in the

Taylor case, certainly brings it, in my opinion, far below that which is sought by the Crown.

[17] The sentence I am going to impose is as follows. For the initial driving while disqualified - this happened not long after the driving prohibition was placed on him; that was done in February, we are talking June - I am satisfied that the sentence in that case would be 30 days custody. With respect to the second offence in August of that year, it is aggravated by the fact that Mr. Samson is out on a charge already of doing so; he clearly knows what he is prohibited from doing, yet nonetheless does it, that is going to be 60 days and that is going to be consecutive. With respect to the third incident, happening a year later, aggravated by the fact that there was an accident, although there is an explanation provided; the reality is the explanation is sort of irrelevant because Mr. Samson should not have been driving in the first place. Again, remembering that I am not sentencing someone with prior convictions, only prior contact with the law that should have made him aware of the importance of not driving, the sentence in that case is going to be 90 days consecutive. With respect to the fail to appear in court, the sentence on that will be 30 days consecutive. So it is actually a total of seven months custody.

[18] With respect to his time in custody, Mr. Samson has spent 151 days in pre-trial custody. Through some discussion, there has been an agreement between counsel that he should be credited at a rate of 1.2:1. That forestalls the need to obtain additional information from the Whitehorse Correctional Centre. There has been no s. 524 application; he is on consent remand; he is entitled to seek custody over and above the 1:1 on the earned remission status. I certainly have information from him that

he has attended AA; that he has worked as a baker and cleaner; that he has not refused any employment; he has not refused any counselling, although counselling, as this court has heard before, is not something that remand inmates are directed to do, and neither, necessarily, is employment.

[19] There are some issues with respect to behaviour. Mr. Samson admitted that he was in segregation once. Frankly speaking, we have not had enough time today, when I raised this issue for counsel, to get to the bottom of what exactly his behaviour was overall, and in the circumstances, Crown, of course, is entitled to seek out additional information in such cases. The end result is Crown and defence have agreed on 1.2. While that may have been less than he would have been entitled to, I am not going to interfere with that agreement. So at 1.2:1, which is, effectively, one additional month's credit to the five that he has been in custody already, 30 days additional credit will go. That will be time served and that 30 days will be for the fail to appear in court.

[20] The other five months will be credited as: two months of that will be credited 60 days; so 60 days will be time served on the August 2010 offence, and 90 days will be credited on the 2011 offence. That will leave a remanet of 30 days custody to be served. That is less than the Crown, and frankly, less than defence propose, but my review of the case law and circumstances satisfies me that this is an appropriate disposition.

[21] Now, this said, Mr. Samson, you have now been convicted, and were you to find yourself facing another drive disqualified, you could expect yourself to be looking at a higher sentence than what has been imposed today. Had you been convicted and then

committed an offence and convicted again, and committed an offence and convicted again, you would be looking, likely, at a higher sentence as well. So that is it. That is your chance. This is sort of your light at the end of the tunnel. That light will diminish if you find yourself committing further offences, and if you find yourself doing it in concert with an impaired, that would clearly not be very good for you.

[22] With respect to the driving prohibition, Mr. Samson has - and this is something I have factored in - the three year prohibition he was on is likely over now. He is willing to, and his counsel submitted, that Mr. Samson, in fact, indicated that he would accept a five year driving prohibition. I could impose consecutive prohibitions, but I am satisfied - the Crown had indicated a three year prohibition - I am satisfied that you should be prohibited from operating a motor vehicle on any street, road, highway, or public place for a period of three years. That, of course, will attach to all of the offences; it will be three years plus any period of custody that you serve, remaining.

[23] Defence counsel also offered a fine. Frankly, I am not going to impose a fine. I do not like the notion of buying out time, as the Crown says this would be akin to, but that is not why I would necessarily have done it. It is not something that I am comfortable imposing. There is not going to be a fine in this case.

[24] There will be Victim Fine Surcharges on all four offences, and the Victim Fine Surcharge, as Crown has proceeded by summary on everything, will be a total of $200. How much time will you need to pay that?

[25] MR. REYNOLDS: Four months may be appropriate. It will allow Mr. Samson to exit the jail and procure employment.

[26] THE COURT: There will be four months' time to pay. Remaining count?

[27] MS. NGUYEN: Withdrawn.

[28] THE COURT: So all counts to which guilty pleas were not entered will be withdrawn.

[29] You are not going to be in custody that much longer. Make your plans to put yourself in a situation where you will not be back before any courts in the future.

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COZENS C.J.T.C